IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO.5075 OF 2004

Jayendragiri Anandgiri Goswami ...Appellant.

V/s

Narcotics Control Bureau
and Anr. ...Respondents.

Mr. Ayaz Khan, advocate for the applicant.

Mr. P.M. Pradhan with Mr. D.N. Salvi, advocates for
Union of India.

Mr. D.P. Adsule, APP for the State.

CORAM: V. M. KANADE, J.
DATE: 27th January, 2005

ORAL ORDER:

1. Applicant is accused No.8 in N.D.P.S. Case No. 23 of 2001 and the applicant is charged with an offence under section 29 of the N.D.P.S. Act.

2. The interesting question which falls for consideration before this Court is : whether detention of the applicant after 13/12/2000 is illegal on account of breach of the provisions of section 57 of the Criminal Procedure Code and is in violation of Article 22(2) of the Constitution of India?

3. Brief facts are as under :-

4. On 28/11/2000, Officers of respondent No.1 received an information that narcotic drugs were being transported in the car and, subsequently, on the basis of the said information, three persons were arrested viz. Suresh Jain, K. Anthony and Rajeev Shiroor on the said date. Thereafter, certain chemicals were seized from village Katai in November 2000. During the course of investigation, the name of the applicant was disclosed by the co-accused. The applicant, at that time, was arrested and was in jail in Ahmedabad Central Jail in connection with some other offence.

5. The application was made on 11/12/2000 in the Special Court seeking permission to arrest the applicant in N.D.P.S. Special R.A. No.94 of 2000. It was also prayed that the Intelligence Officers may be permitted to have N.C.B. custody of the applicant herein for the purpose of investigation. Accordingly, the order was passed by the Special Judge and CMM, Ahmedabad was requested to grant permission to the Intelligence Officer, Narcotics Control Bureau to arrest the applicant herein in Special R.A. No.94 of 2000 and also to have N.C.B. Custody. Accordingly, the applicant was transferred from Ahmedabad Central Jail and was produced before the Special Judge, Mumbai on 12/12/2000 who was pleased to pass the following

order.

> "Accused is produced from Ahmedabad Central Prison on transfer warrant. The accused does not have any complaint of illtreatment at the hands of the N.C.B. Officers. I have gone through the R.A. Investigation is in progress and to facilitate the the same the accused is remanded to N.C.B. Custody till 20-12-2000."

On 13/12/2000, an arrest memo was served on the accused and, in the arrest memo, the Intelligence Officer stated that under the provisions of section 42 of the N.D.P.S. Act, applicant was placed under arrest on 13/12/2000 at 11.00 Hrs for his involvement in procurement, storage and transportation of 3,50,000 Methaqualone (Mandrax) Tablets. On the same day, the report of arrest was also issued in which it was submitted that the applicant was communicated the grounds of his arrest by serving him a copy of the arrest memo dated 13/12/2000.

6. The applicant filed his first application for bail before the Special Judge, Mumbai which was rejected on 17/18-8-2001. Against the said order, an application was preferred in this Court being Bail Application

No.1857 of 2002 which was rejected on 27/6/2002. Thereafter, another application was filed being Criminal Application No.1597 of 2003 in this Court which was rejected on 5/6/2003. Thereafter, another Bail Application No. 132 of 2004 was filed before the Special Court. This application was rejected by the Special Judge on 27/1/2004. Against the said order, applicant preferred another application in the High Court being Criminal Application No.831 of 2004. This Court by an order dated 29/9/2004 directed the Special Judge to consider the grounds raised by the applicant in respect of violation of constitutional rights as envisaged by Article 22 of subclause (2) of the Constitution of India. This Court directed the Special Judge to decide all questions in the context of infraction of Article 22 subclause (2). The Special Judge, thereafter, considered the bail application of the applicant and by an order dated 28/10/2004 was pleased to reject his application. Against the said order, the applicant has preferred this present application for bail.

7. The principal contention raised by the learned Counsel appearing on behalf of the applicant is that the applicant was arrested on 13/12/2000 and it was the mandatory duty of the Intelligence Officer, N.C.B.

to produce him before the Special Judge within 24 hours after his arrest. He has submitted that as a result of failure of respondents to produce him before the Special Judge, there has been infraction of his constitutional right as envisaged under Article 22 subclause (2) of the Constitution of India and also under section 57 of the Criminal Procedure Code and his detention after 13/12/2000 is, therefore, illegal and, as a result, the applicant is entitled to be released on bail on account of the said infraction. It is also submitted on merits that the only evidence against the applicant was in the form of statement of the applicant which was recorded during his custody with the N.C.B. and which statement was retracted by him immediately on 3/1/2001. It is submitted that apart from this statement, the only other evidence available with the prosecution was the statement of the co-accused who had given an information that six months prior to the incident which had occurred on 28/11/2000, the applicant had supplied 350000 tablets of Methaqualone. It is submitted that there was no evidence regarding the said supply apart from solitary statement of the co-accused. He, therefore, submitted that the applicant is also entitled to be released on bail on merits.

8. The learned Counsel appearing on behalf of the respondents, on the other hand, submitted that the applicant was involved in a serious offence of delivery of Methaqualone and that he was one of the 19 accused persons who were members of the large scale conspiracy arrested by the Officers of respondent No.1 in respect of production, delivery and supply of Methaqualone in the form of tablets and powder, a psychotropic substance within the meaning of N.D.P.S. Act. He submitted that the Methaqualone which was recovered and seized was more than 500 kgs. He submitted that present contention which is raised by the applicant was considered by this Court in earlier Bail Application preferred by the applicant being Bail Application No.1857 of 2002 and this contention was specifically raised by the applicant and was rejected by this Court. He submitted that in subsequent Bail Application No.1597 of 2003 also the applicant had raised this contention and the said application was decided by this Court on merits. It is submitted that this ground also was specifically raised and agitated in the said Bail Application No.1597 of 2003. It is further submitted by the learned Counsel appearing on behalf of the respondent No.1 that the applicant was produced before the Special Court on order being

passed by the Special Judge, Mumbai and he was produced on transfer warrant and the Special Court had remanded the accused till 20/12/2000. He submitted that though the applicant was shown to be arrested on 13/12/2000, since remand was granted by the Special Court till 20/12/2000, there was no infraction of section 57 of the Code of Criminal Procedure and Article 22 subclause (2) of the Constitution of India. It is submitted that the applicant was already arrested by Ahmedabad Court and was in jail in Ahmedabad Central Prison and on an application being made by the respondent No.1, the applicant was transferred to Bombay on transfer warrant and he was immediately produced within 24 hours i.e. on 12/12/2000 and was remanded to custody till 20/12/2000. He submitted that, therefore, this was not a case where the applicant was arrested for the first time on 13/12/2000 and was not produced before the Magistrate within 24 hours. He submitted that, therefore, there was no infraction of provisions of the Criminal Procedure Code and Article 22(2) of the Constitution of India.

9. The learned Counsel appearing on behalf of the applicant relied upon the judgment of this Court in the case of **Suaibo Ibow Cassama Vs. Union of India**

and another, reported in **1994(1) Bom.C.R. 64** in support of his submissions. He submitted that this Court which was called upon to consider similar case in the said matter was pleased to observe that the provisions of Article 22(2) of the Constitution of India had an overriding effect over the provisions of Section 57 and section 167 of the Criminal Procedure Code as also section 37 of the N.D.P.S. Act. The learned Counsel appearing on behalf of the applicant submitted that, in the said judgment, the learned Single Judge of this Court was pleased to refer to the judgment and order in three cases decided by this Court wherein similar submission was made and was pleased to hold that continued detention of the applicant therein beyond the period of 24 hours was directly in breach of the fundamental right of the accused under Articles 21 and 22 of the Constitution of India. He also relied upon the judgment of the Full Bench of the Madras High Court in the case of **Roshan Beevi and others vs. Joint Secretary to Government of Tamil Nadu and others** reported in **1984 Cri.L.J. 134**. He submitted that in the said judgment the Full Bench of the Madras High Court had clearly made a distinction between the terms "custody" and "arrest" and had held that these terms are not synonymous terms. He submitted that the Full Bench of

the Madras High Court in the said judgment had observed that in every case of arrest the custody of the accused is with the officers. However, that is not true in every case of custody. He invited my attention to para 23 of the said judgment as also paras 26 and 30. He also invited my attention to para 48 of the said judgment wherein a similar question was dealt with by the Full Bench of the Madras High Court. He also invited my attention to the judgment of the Supreme Court in the case of **Directorate of Enforcement Vs. Deepak Mahajan and another** reported in **AIR 1994 SC 1775** wherein the Supreme Court also had taken a similar view. He invited my attention to para 50 of the said judgment wherein the Supreme Court had referred to the Full Bench Judgment of the Madras High Court. He also referred to the unreported judgment of this Court in Criminal Application No.2628 of 1991 decided on 31/10/1991 by M.F. Saldanha, J. He thereafter referred to the judgment of the Supreme Court in the case of **Kashmira Singh Vs. The State of Madhya Pradesh** reported in **AIR 1952 SC 159.** He also relied upon the judgment of the Supreme Court in the case of **Haricharan Kurmi Vs. State of Bihar** reported in **AIR 1964 SC 1184.**

10. The learned Counsel appearing on behalf of the respondent No.1 relied upon the judgment of the Supreme Court in the case of **Saptawna Vs. The State of Assam** reported in **AIR 1971 SC 813**.

11. I have given my anxious consideration to the various submissions made by the learned Counsel appearing on behalf of the applicant and the respondents. It would be profitable to refer to various provisions of Criminal Procedure Code, N.D.P.S. Act and the provisions of Article 22 subclause (2) of the Constitution of India before considering the rival contentions. Section 57 of the Criminal Procedure Code as also section 167 subclause (1) of the Criminal Procedure Code in unequivocal terms lay down that the accused who is arrested shall be produced before the Magistrate within a period of 24 hours. The mandate given in these provisions is derived from the fundamental right given to any person under Article 22 subclause (2) of the Constitution of India which mandates that any person who is arrested has to be produced before the Magistrate within 24 hours.

12. Sections 57, 167(1) of the Criminal Procedure Code and Article 22(2) of the Constitution of India

read as under:-

> "**57. Person arrested not to be detained more than twenty-four hours.-** No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under s 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

> "**167. Procedure when investigation cannot be completed in twenty-four hours-**(1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by s 57, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial

Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

Article 22(2)

"22. Protection against arrest and detention in certain cases. (1).....

.....

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate."

13. In the present case, however, the peculiar facts are that the applicant was arrested by Ahmedabad Police and was in jail in connection with the separate offence and was detained in Ahmedabad Central Prison. The application was filed by the Respondent No.1's

Intelligence Officer, N.C.B. seeking the custody of the applicant and also his arrest in connection with the offence which was registered as N.D.P.S. Case No. 92 of 2000. In the said application, the Intelligence Officer of N.C.B. prayed for Custody of the applicant herein in N.D.P.S. Special R.A. No.94 of 2000. Further facts were stated and the following prayers were made:-

> "1. The Ld. CMM, Ahmedabad may be requested/directed to grant necessary permission to the applicant to arrest the abovenamed Respondent in NDPS Spl. R.A.No.94/2000.
>
> 2. Applicant may be allowed to have NCB custody of the abovenamed Respondent for the purpose of investigation.
>
> 3. That the applicant be allowed to take the abovenamed Respondent to Mumbai under suitable orders of the Ld. CMM, Ahmedabad for production before the Hon’ble Court."

The Special Judge on this application passed an order requesting the CMM, Ahmedabad to grant permission to the applicant to arrest the applicant herein in N.D.P.S. Special R.A. No. 94 of 2000 and also to have N.C.B. custody and to take him to Mumbai. Pursuant to this order being passed, the Ahmedabad Court passed an order and pursuant to the said order he was produced before the Special Judge who, in his order, which is reproduced hereinabove has observed that the accused is produced on a transfer warrant and that on going through the remand application, the accused was remanded to N.C.B. Custody till 20/12/2000.

14. At this stage, it would be relevant to consider the provisions of the Criminal Procedure Code in connection with the execution of the warrant of arrest. Chapter VI of the Criminal Procedure Code deals with the processes to compel the appearance and in the said Chapter, "B" deals with Warrant of arrest. Section 77 of the Criminal Procedure Code prescribed where the warrant can be executed. Section 77 reads as under:-

"**77. Where warrant may be executed.-** A warrant of arrest may be executed at any place in India."

Section 78 of the Cr.P.C. prescribes the provision regarding the execution of warrant which is forwarded for execution outside the jurisdiction of the Court issuing it. Section 80 of the Cr.P.C.deals with the procedure on arrest of person against whom warrant is issued. Section 80 of the Cr.P.C. reads as under.

"**80. Procedure on arrest of person against whom warrant issued.-** When a warrant of arrest is executed outside the district in which it was issued, the person arrested shall, unless the Court which issued the warrant is within thirty kilometres of the place of arrest or is nearer than the Executive Magistrate or District Superintendent of Police or Commissioner of Police within the local limits of whose jurisdiction the arrest was made, or unless security is taken under s 71, be taken before such Magistrate or District Superintendent or Commissioner.

15. In the present case, the Special Judge had passed an order requesting the Ahmedabad Court to transfer the accused to Mumbai on an application filed by respondent No.1 seeking arrest and custody in connection with the N.D.P.S case. The said application was filed on 11/12/2000. The order seeking arrest and custody was passed on the same day by the Special Judge and within 24 hours, he was produced before the Special Judge on 12/12/2000. The application for remand was made by respondent No.1 and in the said remand application it was brought to the notice of the Court that the applicant was produced before the Court pursuant to the order of transfer passed by the Chief Metropolitan Magistrate, Ahmedabad. It was stated in the remand application that the applicant herein be remanded to N.C.B. Custody for a period of 10 days and subsequently the applicant was remanded to N.C.B. custody till 20/12/2000.

16. It would be relevant also to consider section 52 of the N.D.P.S. Act which reads as under :-

"52. Disposal of persons arrested and articles seized-(1) Any officer arresting a

person under section 41, section 42, section 43 or section 44 shall, as soon as may be, inform him of the grounds for such arrest.

(2) Every person arrested and article seized under warrant issued under sub-section (1) of section 41 shall be forwarded without unnecessary delay to the Magistrate by whom the warrant was issued.

(3) Every person arrested and article seized under sub-section (2) of section 41, section 42, section 43 or section 44 shall be forwarded without unnecessary delay to-

(a) the officer-in-charge of the nearest police station, or

(b) the officer empowered under section 53.

(4) The authority or officer to whom any person or article is forwarded under sub-section (2) or sub-section (3) shall, with all convenient despatch, take such measures as may be necessary for the disposal according to law of such person or article."

Pursuant to the provisions of section 52, a duty is cast on the Officer arresting a person to inform him of the grounds for such arrest. The Memo of Arrest which has been issued by respondent No.1 records the grounds of arrest and it is dated 13/12/2000. The report of arrest also records that the grounds of arrest have been informed to the accused - applicant herein. The another provision which is also relevant for the purpose of deciding the present application is section 51 of the N.D.P.S. Act which reads as under.

> "**51. Provisions of the Code of Criminal Procedure, 1973 to apply to warrants, arrests, searches and seizures.-** The provisions of the Code of Criminal Procedure, 1973 shall apply, in so far as they are not inconsistent with the provisions of this Act, to all warrants issued and arrests, searches and seizures made under this Act."

From the perusal of section 51, in my view, it is very clear that the provisions of Chapter VI-B pertaining to warrant of arrest also will be applicable to the

provisions of the N.D.P.S. Act. In my view, in the light of the aforesaid peculiar facts, the contention of the learned Counsel appearing on behalf of the applicant cannot be accepted that, in the present case, there has been violation of the provisions of section 57, 167(1) and Article 22(2) of the Constitution of India.

17. It is no doubt true that the provisions of Article 22(2) of the Constitution of India have an overriding effect over the provisions of section 37 of the N.D.P.S. Act and the said provisions have to be followed to the hilt by the Investigating Officer and the continued detention of a detenue beyond the said period would consequently be illegal and the only alternative would be to release such detenue from the illegal detention. In the present case, however, distinction will have to be made inasmuch as the applicant was already arrested and was detained in Ahmedabad Central Jail. An order was passed by the Special Judge seeking his arrest and custody from the Ahmedabad Court which was granted by the Ahmedabad Court. The applicant was produced within 24 hours after he was brought to Mumbai from Ahmedabad before the Special Judge who remanded him to N.C.B. custody in connection with the present N.D.P.S. case. Though

the accused was arrested on 13/12/2000 the remand was already granted by the Special Court in connection with the N.D.P.S case. It would be relevant here to peruse the prayers which were made on 11/12/2000 by the respondent No.1. The prayers categorically state that the applicant was to be arrested and detained in custody for an investigation and, thereafter, in the remand application, custody of the applicant was granted by the Special Court on 20/12/2000.

18. Ordinarily, any person who is not otherwise arrested and detained and is taken in custody, the mandate of Article 22(2) would have to be followed. Here, in the present case, applicant was already arrested and remanded on production on transfer warrant till 20/12/2000. His non-production on 13/12/2000, in my view, would at the best be technical lapse and, therefore, would not amount to a breach of the mandatory provisions of Article 22(2) of the Constitution of India. It must, however, be clarified here that the detention of any person on the ground of taking him in custody for investigation and not showing his arrest for for an indefinite period would clearly in violation of Article 22(2) of the Constitution of India. It would not be open for the Investigating Agency to take the custody of the

accused and detain him for the purpose of investigation without showing his arrest and, thereafter, issue an order of arrest on a subsequent date. In this case, however, the facts are slightly different. The benefit would not be available to the accused. There cannot be any doubt regarding the ratio laid down by the Apex Court in its judgment in the case of **Directorate of Enforcement Vs. Deepak Mahajan and another** reported in **AIR 1994 SC 1775**. The Apex Court in para 50 of the said judgment has observed as under:-

> "50. Thus the Code gives power of arrest not only to a police officer and a Magistrate but also under certain circumstances or given situations to private persons. Further, when an accused person appears before a Magistrate or surrenders voluntarily, the Magistrate is empowered to take that accused person into custody and deal with him according to law. Needless to emphasize that the arrest of a person is a condition precedent for taking him into judicial custody thereof. To put it differently, the taking of the person into judicial custody is followed after the arrest of the person concerned by the Magistrate on

> appearance or surrender. It will be appropriate, at this stage, to note that in every arrest, there is custody but not vice-versa and that both the words 'custody' and 'arrest' are not synonymous terms. Though 'custody' may amount to an arrest in certain circumstances but not under all circumstances. If these two terms are interpreted as synonymous, it is nothing but an ultra legalist interpretation which if under all circumstances accepted and adopted, would lead to a startling anomaly resulting in serious consequences, vide Roshan Beevi (1984 Cri LJ 134 (FB) (Mad) (supra)."

The Full Bench of the Madras High Court in the case of Roshan Biwi and others (supra) in para 16 has observed as under:-

> "16. From the various definitions which we have extracted above, it is clear that the word 'arrest', when used in its ordinary and natural sense, means the apprehension or restraint or the deprivation of one's personal liberty. The question whether the person is under arrest or not, depends not on the

> legality of the arrest, but on whether he has been deprived of his personal liberty to go where he pleases. When used in the legal sense in the procedure connected with criminal offences, an arrest consists in the taking into custody of another person under authority empowered by law, for the purpose of holding or detaining him to answer a criminal charge or of preventing the commission of a criminal offence. The essential elements to constitute an arrest in the above sense are that there must be an intent to arrest under the authority, accompanied by a seizure or detention of the person in the manner known to law, which is so understood by the person arrested. In this connection, a debatable question that arises for our consideration is whether the mere taking into custody of a person by an authority empowered to arrest would amount to 'arrest' of that person and whether the terms 'arrest' and 'custody' are synonymous."

In para 17 of the said judgment the Full Bench of the Madras High Court after considering the definition of

the term "custody" appearing in number of enactments,

in para 17-A observed as under:-

> "17-A. Therefore, it is clear that we have to take the meaning of the term ‘custody’ with reference to the context in which it is used."

Therefore, it is clear that we have to take the meaning of the term "custody" with reference to the context in which it is used. In para 29 of the said judgment the Full Bench of the Madras High Court has observed as under:-

> "29. For all the discussions made above, we hold that ‘custody’ and ‘arrest’ are not synonymous terms. It is true that in every arrest there is a custody, but not vice versa. A custody may amount to an arrest in certain cases but not in all cases. In our view, the interpretation that the two terms ‘custody’ and ‘arrest’ are synonymous is an ultra legalist interpretation, which if accepted and adopted, would lead to a startling anomaly resulting in serious consequences."

The learned Single Judge of this Court in the case of **Suaibo Ibow Cassama Vs. Union of India and another** reported in **1994(1) Bom.C.R. 64** in para 12 of his judgment has observed that the mandate of Article 21 and clause (2) of Article 22 would be supreme, overriding even the provisions of section 37 of the N.D.P.S. Act. The facts of the said case, however, were entirely different. The said judgment can be distinguished on facts. The petitioner, in the said case, was arrested in the night between 1st and 2nd November 1991. The seizure panchanama commenced at 5.30 a.m. on 2/12/2991 and it was completed at 8 a.m. on the same day. The statement was recorded immediately thereafter. The petitioner in the said case was produced before the Chief Metropolitan Magistrate on 4/11/1991. In the remand application, though it was stated that the arrest was made on 3/11/1991 neither time was mentioned about the arrest nor any panchanama was made. In the light of these facts, the learned judge, relying on three judgments of this Court in a similar case, held that the detention was illegal and there was violation of Articles 21 and 22 of the Constitution of India. The said judgment, therefore, can be distinguished on the facts of the said case.

19. The learned Counsel appearing on behalf of the respondent No.1 has relied upon the judgment of the Supreme Court in the case of **Saptawna Vs. The State of Assam** reported in **AIR 1971 SC 813** in support of his submission that in a case where a person is detained in number of cases and is shown to be arrested only in one case, it would not make any difference. In my view, the ratio of the said judgment would not be applicable to the facts of the present case. In the said case, petitioner was detained initially under the Armed Forces (Assam and Manipur) Special Power Act, 1958 and, thereafter, he was arrested by the Civil Police on January 24, 1968 and was produced before the competent Magistrate on January 25, 1968 in connection with G.R. Case No.27/68. Civil Police also registered the other cases against him vide G.R. No.235/68 of Aijal Police Station Case No.16(8)/68 and G.R. No.212/66 of Aijal Police Station Case No.54(5) 166 under section 121 of the Indian Penal Code. Under the provisions of the Armed Forces (Assam and Manipur) Special Power Act, 1958 the member of the Armed Force is entitled to detain any person under the provisions of the said Act and need not produce the said person before the Magistrate within 24 hours. The provisions of the Criminal Procedure Code and the provisions of Article 22 become applicable after he is presented to

the Civil Police. The facts and circumstances of the said case, therefore, are entirely different and the ratio of the said judgment, in my view, would not be applicable to the facts of the present case.

20. So far as the second submission of the learned counsel appearing on behalf of the applicant is concerned regarding merits of the application for bail of the applicant, his application for bail was rejected on merits by this Court on two earlier occasions. No fresh circumstances have been made out for reconsidering his application on merits. Application for bail is therefore rejected. It is, however, clarified that it will be open for the applicant to consider the effect of recording of his confessional statement while in custody and the said submissions made by the learned counsel appearing on behalf of the applicant are kept open.

V.M. KANADE, J.